Nos. 460-461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

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To one familiar with the mass of evidence in this case, it is apparent that the petition for certiorari (1) does not completely state the issue in the case; (2) does not correctly state the ruling of the Circuit Court of Appeals; and (3) does not adequately state the undisputed facts in the case.

Also, when the legal rulings are accurately defined, it is clear that the case does not turn on any new or difficult question of law and does not present any matter that deserves review because of its public importance in the administration of the Act, or because it is in conflict with decisions of this Court or other Circuit Courts of Appeals.

To make these statements clear, some consideration of the evidence in the case is necessary. The evidence is lengthy, but with the exception of two trivial incidents is free from conflict. This is not a case where on conflicting testimony the Board has drawn certain conclusions of fact which must be binding on the reviewing court. On the contrary, it is a case where the evidence is free from dispute, but where the Board reached conclusions which are not supported by the evidence nor based on reasonable inference drawn from the evidence.

The questions are wholly factual. The question is whether the evidence taken as a whole (as distinguished from isolated facts, the meaning of which is changed or modified by the whole record) presents a case where the Board's finding is supported by "substantial evidence." Admittedly, the statute makes it mandatory that the Circuit Court of Appeals examine the evidence as a whole to determine this question. The legal test for making this determination is now settled beyond dispute. It is the same test which a court applies in reviewing the sufficiency of evidence to require the submission of a case to the verdict of a trial jury.[1] This is exactly the legal test applied by the Circuit Court of Appeals in this case.[2]

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[1] Substantial evidence to support a finding of the Board "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Labor Relations Board v. Columbian Enameling and Stamping Company* (1939), 306 U. S. 292, 300.

[2] "It must rest upon the determination by this court, under the settled rules which govern jury verdicts, whether the undisputed facts are in law capable of fairly giving rise to the fact inferences the Board has drawn, * * *." (R. 205)

Therefore, the only question involved is whether the Court, after a careful analysis and study of the evidence, was correct in holding that there was no substantial evidence to sustain the Board's conclusions.

We believe all of this will be clearer from the following discussion:

I.

THE PETITION FOR CERTIORARI DOES NOT COMPLETELY STATE THE ISSUE IN THE CASE.

On page 12 of the petition opposing counsel state:

"1. The court below correctly stated the Board's position to be (R. 207-208)—

> 'that the Association was and remained tainted and could not represent the employees because there had been no sufficiently clean break away from the old, to establish a new Association, by a complete dissolution and abandonment of the old and a fresh start from scratch.' "

By beginning the quotation from the opinion without a capital letter, the petition indicates to this Court that only a part of a sentence is there quoted.[3] By looking only to the part of the sentence quoted, it would appear that an issue was here involved as to whether it was within the power of the National Labor Relations Board to find that complete disestablishment was essential in dealing with a labor organization which was the same organization or an outgrowth of an organization which had been company dominated. Plainly, this is within the power

[3]This indication that only a part of a sentence is set out arises from counsel's scrupulous care to deal fairly with the Court. Obviously they did not feel, as we do, that the part of the sentence omitted was of critical importance.

of the Board under many circumstances. The decisions from this Court, cited by opposing counsel on page 13 of their petition, undoubtedly establish this.

The present case presents a substantially different question, which is made clear when the opening words of this sentence from which counsel quote are also before the Court. With these additional words the sentence reads thus:

> "*Notwithstanding these undisputed facts*, the Board's position * * * is simply this, that the Association was and remained tainted" etc. (Italics added.)

"These undisputed facts" to which the Court refers are set out in its opinion immediately preceding this sentence, in part, as follows:

> "No case has been cited to us, we have found none, where the record is so completely lacking in any evidence of anti-union activities, anti-union bias on the part of the employer; none where it shows such scrupulous recognition, such earnest efforts to ascertain and abide by the obligations imposed by the act, and such complete avoidance of any act or word from which domination or interference by the employer could be inferred; none in which there was such complete absence of even an atmosphere of seated purpose or preference for one labor organization over the other, or for any; none in which the evidence more positively and beyond question showed that the employees had freely and without any interference, coercion, restraint or even persuasion, on the part of the employer, selected their bargaining representative. There is no claim that the company has ever discriminated against any employee or organization of employees on account of any labor activities or on account of an employee joining or not joining any labor organization. There is no claim that it or any of its supervisory

personnel has in any wise intimated, coerced or used force or threats thereof, or offered any inducements to any of its employees for or on account of any of its employees' labor organ zational activities, or on account of any of them joining or not joining any labor organization. Indeed, during the trial of the case when the company's counsel was undertaking affirmatively to prove that nothing of the kind had ever occurred, the attorney for the Board made the following statement: 'Mr. Examiner, I object to all of these things. The complaint here is clear and charges one thing, that is, domination of the Association and I have not charged and do not now charge and will not charge that the company has discriminated against any employee for union membership or that it has violated any section of the Act other than 8(1) and 8(2).' The proof makes it completely clear; that since the passage of the Act, the company and its employees have sedulously endeavored to conform to it, and that except in respect of one or two acts of minor officials, which were promptly repudiated, there has been no departure by the company or any of its employees from this attitude; that the old Association has been completely superseded by the present one, formed under a new constitution; that the company, because of the effort at organization of the rival union, declined to recogn ze the Association further without an election; and that there was an election with an overwhelming number of the employees, more than 4/5ths of the whole, voting for the Association." (R. 207)

The issue, therefore, was not whether the Board might under some circumstances conclude that disestablishment was the only way to correct previous company interference. The issue was much more concretely related to the immediate case. It was whether under the undisputed facts *in this case* a

finding that disestablishment was necessary to remove the effect of company influence before the date of the passage of the Act was supported by "substantial evidence."

II.

THE PETITION DOES NOT CORRECTLY STATE THE RULING OF THE CIRCUIT COURT OF APPEALS. NO NEW OR DIFFICULT LAW QUESTION AND NO CONFLICT OF DECISIONS ARE HERE INVOLVED.

On page 16 of the petition it is stated that the court below held "that the unlawful conduct of the employer must be continuing at the time of the complaint and hearing." With deference to opposing counsel, we insist that this is entirely erroneous and that the Court of Appeals held nothing of the kind.

The question actually involved was of a different character. It was whether upon the facts in this case the effect of the Company's support of the old association, years before the hearing, had been dissipated by what had been done since then and by the lapse of time. The Court held that it had been dissipated and that there was no substantial evidence to the contrary. As a matter of fact, that Court held that the evidence showed without conflict that there had been no unlawful conduct on the part of the employer and no violation of the Act.

Six years before the hearing, before the Act was passed, the Company contributed to the support of the association as it then existed. This contribution was immediately stopped with the passage of the Act, and the Company adopted the measures hereinafter stated to insure that all of its supervisory personnel rigidly adhered to the obligations imposed by the Act. The support of the association before the Act was not a violation of law. Hence the evidence

in this case does not show "unfair labor practices" by the Company at any time, since that term as here used means a violation of the Act.

What the Circuit Court of Appeals held—and all that it held in this connection—was that, upon the record as a whole, proof that the Company had supported the association before the Act did not justify a finding by the Board that six years thereafter, at the time of the hearing, the Company interfered with and dominated the present Association, or that the effect of the early acts of the Company still persisted.

It is true that the Circuit Court of Appeals refused to be bound by a "formula" which would mean, as applied to the facts of this case, that contributions to an association before the Act would justify the Board in ordering disestablishment of an association in a reorganized form six years after the Act, without any regard to what had happened in the interim. No such formula in such sweeping form has been sanctioned by this Court.[4] The cases collected on page 13 of the petition, which are cited as approving such a "test," do not go this far. They go only to the extent of holding that prior interference or domination will justify the Board in inferring that such domination continues, unless that inference is rebutted by proof that employees have been adequately advised of their rights and the employer's neutrality. Such proof is uncontradicted in the present case, and in addition there is the further fact that after the minds of the employees had been

[4]This Court has recently in two cases expressed its disapproval of "those who seek for mathematical or rigid formulas" in dealing with practical problems growing out of varying states of fact. *Kirschbaum v. Walling* (decided June 1, 1942), 86 L. Ed. Advance Opinions, 1054; *Walling v. Belo Corp.* (decided June 8, 1942), 86 L. Ed. Advance Opinions, 1166.

thus adequately disabused of any lingering influence, they again freely expressed their choice of the Association as their representative for collective bargaining.

Without attempting to review all of the cases cited in the petition, we refer to *Westinghouse Electric & Manufacturing Company v. National Labor Relations Board*, 312 U. S. 660, as typical, because of the statement of opposing counsel on page 15 of the petition that the "Westinghouse case, in particular, is closely in point." The case illustrates the correctness of the statement made above. The facts are not shown in the opinion of this Court, so reference is made to the facts as reported in the Circuit Court of Appeals' decision, 112 F. (2d) 657, CCA 2. The decision of that Court turned on the fact that while the company made a statement to "representatives" of its neutrality, "the company did not seek to broadcast it or its equivalent in any way to the employees —about 2,500 in all." The failure to make this statement of neutrality to employees appears to be the crucial point in the decision. In referring to the decision of this Court in the *Newport News* case, 308 U. S. 241, on which opposing counsel also rely, the Circuit Court of Appeals says that the basis of that case is found in the fact that "the employees at large had not been advised that the company was wholly indifferent whether they joined the new union." In the present case the Company effectively notified the employees of its neutrality and "hands-off" policy, not merely once, but several times. It so notified them in 1935 by the instructions of Mr. Warren which, it is stipulated, were communicated "to the general body of employees," and by a series of notices and bulletins over a period of years.

It is believed that this same principle will be found to run through the cases on which opposing counsel rely, namely, that while an inference may arise from prior interference or domination, it is a rebuttable inference, which may be completely rebutted by proof, that the company's neutrality had been adequately brought to the attention of the entire body of employees.

The decisions of the Circuit Courts of Appeals have so interpreted the decisions of this Court. For example, in *A. E. Staley Manufacturing Company v. National Labor Relations Board*, 117 F. (2d) 868, 878, CCA 7, the Court, after recognizing that an inference of continued domination might be drawn from previous interference, adds:

> "We do not think such a theory can prevail in face of direct and uncontradicted evidence that petitioner's employees understood that they were free in theory and in fact to join any labor organization they desired."

See also the decision of Judge Learned Hand in the Second Circuit, in *Western Union Telegraph Company v. National Labor Relations Board*, 113 F. (2d) 992, and the decision of the Fourth Circuit in *E. I. du Pont de Nemours & Co. v. National Labor Relations Board*, 116 F. (2d) 388; certiorari denied, 313 U. S. 571.

III.

SUMMARY OF ADDITIONAL FACTS.

Prior to the adoption of the Act there had existed an association of the employees of the Company, and the Company had contributed to the support of that organization. It has never seemed to us of controlling importance to determine whether the present

Association should, from the standpoint of technical law, be considered the old organization or a new employee organization. To some extent it could probably be considered at least an outgrowth of the old organization. This we do not contest. The entirely changed form of organization and functioning justifies the statement of the Circuit Court of Appeals that regardless of its historical connection, "the old Association has been completely superseded by the present one, formed under a new constitution." (R. 207)

The question in the present case is whether the historical connection, and the relation of the Company to the association existing before the Act, are such as to justify the inference of the Board that six years thereafter the Company dominated the then existing employee organization. If we grant that the historical connection could under the decisions cited by the Board justify a rebuttable inference of continued domination (though no case has ever sustained the carrying forward of such inference for any such period of time), it was here completely rebutted by undisputed proof. It is to these facts that the statement here to be made is addressed.

Relation of Company to Association Before the Passage of the Act

Before the National Labor Relations Act was adopted the Company contributed to the support of the association then existing. The organization of the association in other respects was, however, completely independent of management. Management had no r ght to appoint any of its officers or governing boards. (R. 170) It had no veto power over its actions and no other control or influence except its

power to withdraw its financial support. There is no proof in the record that this influence, such as it was, was ever exercised over the association's action.

The Company's Labor Record

"The employer's attitude towards unions is relevant." *National Labor Relations Board v. Link-Belt Company*, 311 U. S. 584.

There is no proof in the record of any hostility on the part of the Company towards organized labor. This includes national labor organizations such as the A. F. of L., to which the I. B. E. W. belongs. The Board does not charge, and made no effort to prove, that the Company had any anti-union record. There is no proof that the support it gave the association before the adoption of the Act was for the purpose of using that association to keep out national unions, nor is there any suggestion that it was so used either before or after the passage of the Act.

The proof, however, goes further than being merely negative in this respect. It shows a definite attitude of neutrality and impartiality on the part of the Company, known to its employees, actually enforced by its management, and to a large extent stipulated by the counsel for the Board.

Care Exercised to Obey the Act[5]

In July, 1935, the National Labor Relations Act became the law of the land. On July 16, 1935

[5]References given as "(App.)" followed by a letter, refer to the Appendix to the Company's brief in the Circuit Court of Appeals, which has been filed with this Court under stipulation. References to "(Tr.)" are to the official stenographic transcript of testimony in the case, which under the stipulation may be referred to. "(Bd. Exh.)" refers to an exhibit of the Board.

(*eleven days after the effective date of the Act*), Mr. J. E. Warren, then the Company's Vice President in charge of operations, now its President, called a meeting in Atlanta of all the principal officials of the Company, both general and of the nine states in which the Company operates, for the purpose of announcing and giving directions on the Company's policy with respect to the Act. Also present at this conference were the chief staff assistants of the general departmental heads, as well as the then President and General Secretary of the then existing employee organization. (App. M.)

Mr. Warren at this meeting read extensively from the National Labor Relations Act, laying especial emphasis on Sections 7 and 8, and explained to those in attendance the rights of employees under these provisions as well as the duties and obligations of management thereunder. He further stated in substance that the employees had a right to do whatever they wished about labor organizations; that the employees had a right to select their own representatives and their own unions or organizations, and that management must exercise an absolute "hands-off" policy and in nowise advise with the employees on such matters, and under no condition indicate what form of organization management preferred, if any; and that it was and would be the policy of the Company to observe the Act to the letter and spirit. (App. M; App. K; App. L.)

Mr. Warren also directed the officers of the Company and the state officials to call in their subordinates with supervisory power, and fully instruct them as to the rights of employees and the obligation of the Company under the Act, and the Company's policy of strict observance of and compliance

with both the letter and the spirit of the Act. He instructed those present promptly to communicate the Company's policy to all such supervisory employees *and to inform the entire employee body* of the Company's policy as announced in the meeting, and of their rights under the Act, and the Company's policy strictly to recognize and respect all of their rights, as well as the Company's complete neutrality with regard to all labor organizations or activities. (App. M; App. K.)

These directions of Mr. Warren were promptly carried out, and his statements, as hereinbefore recited, as to the rights of employees under the Act and of the duty of management thereunder, and of the policy to obey it strictly and to maintain neutrality in all labor organizational matters, were promptly and fully transmitted to all supervisory personnel *and to the entire employee body of the Company.*

The following stipulation is a part of the record:

> "It is stipulated that in July, 1935, the respondent had division managers and superintendents in various departments of the divisions, and district managers and superintendents in various departments of the districts, to the aggregate number of in excess of 120.
>
> It is stipulated that if these men were called as witnesses they would testify that promptly after Mr. Warren's meeting of July 16, 1935, the substance of Mr. Warren's statement as to the Wagner Act, and as to the policy of the Company with respect to that Act as shown in Mr. Warren's testimony in this record, was by such division and district officers communicated to their subordinates *and to the general body of employees of the Company.*

It is further stipulated that they would also testify that so far as each one's individual information went the policy so stated had not been departed from.

It is stipulated that the record in this case may be considered as if such persons had so testified herein and with the same effect as if they had so testified." (Tr. 575-576. Italics added.)

The policy of the Company with reference to the Act and to the rights of the employees thereunder, and its obligations thereunder, has not been changed in any way since the pronouncement of Mr. Warren at the July, 1935, conference, and has been carried out in good faith. (App. M; App. K; App. N; App. I.) As to this there is no conflict whatever in the evidence.

The Company has never discriminated against any employee or organization of employees on account of any labor activities or on account of an employee joining or not joining any labor organization; nor has it or any of its supervisory personnel in anywise intimidated, coerced, or used force or threat thereof, or offered any inducements to any of its employees for or on account of any of its employees' labor organizational activities, or on account of any of its employees joining or not joining any labor organization (App. K.); nor, except in one isolated instance, at Shreveport, Louisiana (which was promptly corrected), have any of its supervisory personnel undertaken to influence any of the employees with respect thereto.*

*This Shreveport incident was not only promptly corrected by management and all supervisors there given instructions to be neutral, but was in itself completely trivial. It involved one exchange out of more than 900, and 4 em-

The Board, however, sought to nullify the effect of everything the Company did to obey the Act because of three memorandums issued from time to time under the title of "Wagner Bill Interpretations." These are found as Appendices B, C, and D to the Company's brief in the Circuit Court of Appeals, which, under stipulation, may be referred to here. Without full discussion we request that they be examined and allowed to speak for themselves. There is not a word in any one of them remotely suggesting the things which the Board has sought to deduce from them. They merely evidence an earnest and sincere effort to ascertain what the Act required, and to see that it was complied with. They are in line with the position taken by the Company upon the adoption of the Act—that so far as this Company was concerned it must be obeyed.

In the memorandum issued in April, 1937, the following, among other principles, were stated "to be observed by this Company in dealing with the Southern Association of Bell Telephone employees":

> "The Company cannot engage in any activity designed to induce or prevent its employees from joining this or any other labor organization."
>
> "The provisions of this Act make it illegal for an employer to dominate or interfere with the formation or administration of any labor organization, and the management of this Company should conscientiously observe these provisions." (App. D.)

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ployees out of a total of over 23,000. It is significant that *it is the only instance* in which the Board raises any question of this kind. There was no reason for the corrective action of the management at Shreveport to be "made known to the general body of employees" (Petition, p. 9). The incident did not affect the general body of employees and was not known to them.

It is true that the memorandums show that from the adoption of the Act to the early part of 1937 the Company still believed that it was legal for the Association to meet on Company premises; construed the provision in the statute that salaries of employee representatives could be paid while conferring with management as including also the time devoted to preparing for such conferences and to carrying out arrangements so agreed upon; and permitted the Association's mail to go through inter-office mail facilities. All of this was ended in the early part of 1937, after some decisions of the Board had indicated some question about such practices. There has been no discrimination in this respect. No other labor organization has been refused such privileges (Tr. 650-651) and in fact during the period involved no competing labor organization existed.

From all of the foregoing a finding was demanded that this Company has taken proper measures to obey the Act; to advise its employees fully of their rights under it; to respect those rights; and to maintain an attitude of complete neutrality; and that all of these things were fully known to the employee body. The record is, in fact, even stronger than the condensed statement here presented.

IV.

EMPLOYEES' FREE SELECTION OF ASSOCIATION.

After the Company's declaration of neutrality of 1935, 83% of the employees, free of any influence from the Company, signed membership cards in the Association. (Bd. Exh. 16, p. 11; Tr. 423.)

Thereafter, an increasing number of the employees each year renewed their membership in the

Association, thereby again freely selecting it as their bargaining agency.

In the early part of 1941, but before the complaint herein was filed, and after the Association had given the Company notice that it had ceased to act as the bargaining agent, the Association held a referendum, conducted under the most careful circumstances, and an overwhelming majority again designated the Association as their bargaining agent.

The Board's contention about the Company's use of the word "noted," in reply to the notice of the Association that it would not act as bargaining agent, is not impressive. The Company accepted the fact that the Association would cease to represent the employees until and unless they obtained new authority. The employees were advised of this. The Company posted notices on all bulletin boards of its complete neutrality,[7] then the vote was taken. No play on words can destroy the effect of what happened. The Association was disestablished and the employees were so advised. It received new authority by an impressive vote.

V.

THE WRIT SHOULD NOT BE GRANTED.

It has long been settled that this Court, in the exercise of its discretion to grant or refuse a review by certiorari, will not be guided by a narrow consideration of technical questions in the immediate case, nor, indeed, even by the rights of the immediate litigants, but will exercise a broad discretion, always considering the public interest. We have pointed

[7]This notice posted at 2,173 places (App. F; App. M) is in sweeping and comprehensive terms. The Board has found nothing to criticize in the notice. It is printed as Exhibit A to the Company's amended answer. (R. 41-43)

out that no important questions of law which need to be settled in the public interest are involved in this case. It is also clear that the decision of the Circuit Court of Appeals does not frustrate the purpose of the National Labor Relations Act to permit employees freely to choose their own form of organization. On the contrary, a fair consideration of the evidence demonstrates that this purpose of the Act is in fact preserved by the decision. These considerations alone should be sufficient to cause the Court to deny the petition.

These considerations, however, do not stand alone. There are affirmative reasons why this writ should be denied. Every effort of the Government is now being exercised to preserve industrial peace and to prevent unnecessary and useless controversy. These ends, of course, are not to be accomplished by denying to labor its rights, or its real freedom of organization; but where it is clear that there has in reality been no such denial, litigation which uselessly agitates such matters should not be prolonged. Without elaboration, it is proper for us to point out that this is especially true with respect to a communication system serving nine southeastern states and maintaining telephone communications essential to the country's war effort which is concentrated in that section.

Respectfully submitted,

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Atlanta, Georgia
October, 1942